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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

GEOFFREY BARR,

Defendant and Appellant.

B203246

(Los Angeles County
Super. Ct. No. MA035599)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Carol Koppel, Judge. Affirmed with directions.

Joanie P. Chen, under appointment by the Court of Appeal, for Defendant
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E.
Winters and Dana M. Ali, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Geoffrey Barr appeals from a conviction for assault with a deadly weapon -- his truck. He contends that there was insufficient evidence to support his conviction. He also contends that the trial court erred in failing to instruct the jury sua sponte regarding the defense of necessity. We find substantial evidence in the record to support appellant's conviction, and determine that the omission of a necessity instruction was not error. Thus, we affirm the judgment. However, we have found a clerical error in the abstract of judgment, and order that it be corrected.

BACKGROUND

Appellant Geoffrey Barr was charged in a three-count information with battery upon John Hamm with serious bodily injury (count 1), assault with a deadly weapon -- a knife -- upon John Hamm (count 2), and assault with a deadly weapon -- a vehicle -- upon Clyde Merrick (count 3).¹ In addition to other sentence enhancement allegations relating to counts 1 and 2, it was alleged that appellant had been convicted of a prior serious felony.

The evidence at trial established that appellant engaged in a bar fight with John Hamm. Hamm testified that he spent the evening of July 4, 2006 at the Silver Spur Bar, drinking with his wife and friend Clyde Merrick in celebration of his birthday. Hamm claimed that appellant made some offensive remarks and then punched him in the eye. The two men fought, throwing punches at each other. When Hamm appeared to be getting the better of appellant, appellant's father came from behind Hamm and put him in a chokehold. Hamm testified that he saw

¹ “[A]ny operation of a vehicle by a person knowing facts that would lead a reasonable person to realize a battery will probably and directly result may be charged as an assault with a deadly weapon.” (*People v. Wright* (2002) 100 Cal.App.4th 703, 706; Pen. Code, §§ 240, 245, subd. (a).)

something shiny in appellant's hand as appellant made a plunging motion, and although he did not feel anything, he saw blood soaking his t-shirt. Hamm suffered a five- or six-inch deep wound and a black eye.

Clyde Merrick, who belonged to the same motorcycle club as Hamm, claimed that appellant threw the first punch, and as he and Hamm attempted to leave the bar, someone placed Hamm in a chokehold, and appellant appeared to punch Hamm in the stomach or rib cage. Hamm said, "That guy just stabbed me[,]” and appellant fled.

Merrick testified that he left the bar soon after appellant, and followed appellant's truck on his motorcycle in order to note his license plate number. He observed another motorcycle, driven by one of the witnesses to the bar fight, Steve Altieri. Traveling at approximately 70 miles per hour, the two motorcycles followed appellant's truck. Merrick approached almost close enough to see the license plate, when the truck suddenly came to a near stop, causing Merrick to have to pass the truck to avoid it. The truck was then behind Merrick, accelerating and following him in a manner that appeared to be an attempt to run him over. The truck came so close that Merrick had to move into the oncoming traffic lane to avoid being hit. When appellant passed Merrick, he stopped, and Altieri approached and told him he had obtained appellant's license plate number. The two then turned around to return to the bar, when Merrick observed appellant's truck also turning around, making "donuts" on a small dirt road ahead, and raising dirt clouds. Appellant's truck approached the two motorcycles as they headed toward the bar, obviously chasing them, and causing Merrick to accelerate. Altieri's motorcycle was not as fast as Merrick's and Merrick observed the truck following it closely, moving in unison with Altieri as he moved from one side of the lane to the other. Finally, Altieri moved into the opposing lane, and the truck passed him. Merrick then turned onto a different road, but appellant made the

same turn and drove directly toward him. A few moments later, appellant stopped, turned, and left the area.

Appellant was arrested the next night and later interviewed by Los Angeles Deputy Sheriff Steven Harbeson and other deputies. Harbeson testified that appellant claimed the fight started when Merrick and Hamm attacked him, knocking him down. Appellant claimed that his father then put Hamm in a chokehold, and as he was picking himself up, Hamm shouted that he had been stabbed. Appellant denied having stabbed Hamm, and speculated that Hamm stabbed himself.² Appellant claimed that his father's nose and his own were broken in the fight. However, Deputy Harbeson had been present when appellant was arrested, and saw no visible injuries on him.

Appellant told the deputies that when he left the bar, two motorcycles chased him, tried to run him off the road, and kicked the side of his truck. Appellant told the deputies that this made him angry, so he braked hard, turned, and went after them. He said he "was going to fuck him up," and show them "they're not going to fuck with . . . me."

Appellant testified in his own behalf. He testified that Hamm shouted in the bar that it was his birthday, and then came to appellant's table to talk to someone there. Appellant asked him how old he was, shook his hand and gave him a little hug. When he noticed Hamm's club logo, he asked how they had thought up the name, and commented that he would not like being called "Old Fux." Appellant testified that Hamm then became angry and hit him in the face, causing him to fall into some tables, where Hamm delivered more blows to his face, saying,

² At the time of appellant's arrest, a knife was found clipped to his pants pocket, and another was found in his glove compartment. One of the knives appeared to have blood on it, but it was never tested for blood.

“[M]uther-fucker [*sic*], I’ll teach you to disrespect me, . . . my colors, [and] my bros. . . .” Appellant testified that after wrestling with Hamm, he was able to push him away with a table, and escape out the door. He denied having stabbed Hamm.

Appellant testified that fearing for his life, he left in his pickup truck and headed toward home, but soon saw a motorcycle approaching him fast. He accelerated when the motorcycle came alongside him and he recognized Merrick. He admitted that when he saw a second motorcycle, he braked quickly, but claimed that he braked in order to turn onto a dirt road, thinking that the motorcycles could not follow on a dirt road. He claimed that the truck spun around because he was going too fast and the dirt was soft. Appellant testified that after he returned to the paved road, he made two turns in an attempt to lose the motorcycles, but they kept following, with one after the other coming alongside him. He claimed that one of the motorcyclists kicked the side of his truck. He testified that he was terrified -- afraid they might have guns and would shoot him; so he made more turns in an effort to lose them, but they continued to follow him “the whole time.”

Appellant denied that he had driven toward the motorcycles, or that he had tried to run over either motorcycle. When asked, “Did you try and drive in front of them in some manner as to drive them off the road so that you could flee?” he answered, “No.”

Appellant’s investigator, David Gonda, a former police detective responsible for investigating crimes such as assaults and murders, testified that he had reviewed police and medical reports, viewed the scene, interviewed a witness, and studied a photograph of Hamm’s wound. Based upon his 40 years investigating crimes against persons, during which he had seen many stab wounds, he concluded that Hamm’s wound was not made by a knife.

In rebuttal, Merrick testified that he did not kick appellant’s truck, and would not have been able to kick a moving truck from his motorcycle without

causing himself serious injury. He testified that he “absolutely” did not try to run appellant off the road, and that the contrary was true. Appellant chased him after he turned around upon learning that Altieri had the license number

Prior to the close of testimony, the trial court granted the prosecution’s motion to dismiss count 1 (battery) pursuant to Penal Code section 1385.³ The jury was unable to reach a verdict as to count 2 (assault upon Hamm), and the court dismissed it on motion of the prosecution. The jury subsequently convicted appellant of count 3, assault upon Merrick with a deadly weapon.

Prior to sentencing, the prosecution orally amended the information to allege as to count 3 that appellant had suffered a prior serious felony conviction in 1997. Appellant admitted the prior conviction, giving him a second “strike” under sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d) -- the “Three Strikes” law. The court granted appellant’s *Romero* motion, and stayed imposition of the strike.⁴ The court sentenced appellant to the middle term of three years, pursuant to section 245, subdivision (a)(1), plus a five-year enhancement due to the prior conviction, for a total sentence of eight years.⁵ Appellant timely filed a notice of appeal from the judgment.

³ “The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. . . .” (Pen. Code, § 1385, subd. (a).) All further statutory references are to the Penal Code.

⁴ See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 [trial court may dismiss prior strike].)

⁵ The court stated that it imposed a five year enhancement pursuant to section 667.5, subdivision (a)(1). However, because section 667.5, subdivision (a), establishes a three-year enhancement and section 667.6 has no subdivision (a)(1), it is apparent that the court misspoke, and meant to cite section 667, subdivision (a). Additional clerical error appeared in the abstract of judgment, which states that

DISCUSSION

1. *Contentions*

Appellant makes two assignments of error. First, he contends that there was insufficient evidence to support his conviction for assault with a deadly weapon. Second, he contends that the trial court erred in failing to instruct the jury sua sponte regarding the defense of necessity, as stated in CALCRIM No. 3403, and that such error was reversible absent a jury finding on the issue in another context.

2. *Substantial Evidence of Assault*

When a criminal conviction is challenged as lacking evidentiary support, “the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) In addition, we must presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1019.)

Appellant contends that the evidence was insufficient because Merrick’s eyewitness testimony was unreliable. First, appellant argues that the evidence showed that Merrick wore glasses, but there was no evidence he wore them during the chase. Appellant next points out that it was dark, and the record is silent as to streetlights and what motorcycle lights, if any, Merrick and Altieri had turned on. Further, appellant argues, Merrick testified that he had consumed approximately seven or eight beers that evening. Appellant concludes from these facts that the jury could reasonably have inferred that Merrick could not see with great detail.

appellant was sentenced under subdivisions (b) through (i) of section 667, which would have required the court to double the base term, which it expressly declined to do.

Appellant also points to Merrick's testimony that he did not get close enough to appellant's truck to see the license plate, although Altieri was able to get close enough to do so with a slower motorcycle. Appellant notes there was no evidence that Altieri had to swerve into the oncoming lane of traffic when appellant braked hard in front of the motorcycles, as Merrick testified he had to do. Appellant argues that given such facts, it is incredible that Merrick was close enough to the truck to have to swerve to avoid it, and Merrick's opinion that he needed to do so was pure speculation. Appellant also argues that there was no independent confirmation of the sudden braking, such as black tire marks, or of appellant's "donuts" in the dirt, such as marks in the road. Appellant concludes from his inferences that the evidence was not reasonable, credible, or of solid value, and thus, insufficient to support the verdict.

It is the function of the jury, not the reviewing court, to weigh the evidence and resolve conflicting inferences. (*People v. Yeoman* (2003) 31 Cal.4th 93, 128.) "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." [Citations.]" (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) Further, we must accord due deference to the jury's resolution of a witness's credibility, and not substitute our own evaluation. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Thus, "a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] . . . Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

Contrary to appellant's assertion, Merrick's testimony was sufficient to establish that appellant drove his vehicle at a high rate of speed toward Merrick's motorcycle, knowing of the likely consequences. The jury was entitled to credit

Merrick's testimony that appellant was the vehicular aggressor, over appellant's testimony that he feared for his life and was simply trying to get home.

Moreover, although we need no independent confirmation of Merrick's testimony to affirm the judgment (*People v. Young, supra*, 34 Cal.4th at p. 1181), appellant is mistaken in his assertion that there was none. Corroboration came from appellant himself, who testified that he braked quickly when he saw a second motorcycle, and that his truck spun around after hitting the soft dirt. In addition, he admitted to the deputies who interviewed him that he braked hard, turned, and went after the motorcyclists because he was angry. Appellant's own comments supported the conclusion that he was determined to go after them, not to escape them.

Finally, any vision problem on Merrick's part supported, rather than refuted, his testimony that he approached the truck close enough to have had to swerve as he was trying to see the license number. The jury could reasonably infer that Altieri was able to see the license number without drawing close enough to have to swerve. Merrick's version of the events was not physically impossible or inherently improbable. We accept the jury's inferences, and conclude that Merrick's testimony, supported by appellant's admissions, was "reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt" of assault with a deadly weapon. (*People v. Johnson, supra*, 26 Cal.3d at p. 578.)

3. *Necessity Instruction*

Appellant contends that the trial court erred in failing to instruct the jury sua sponte on the elements of a necessity defense. "The trial court has a duty to instruct sua sponte regarding a defense "only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the

case.” [Citation.]” (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389, quoting *People v. Breverman* (1998) 19 Cal.4th 142, 157.)

“To justify an instruction on the defense of necessity, there must be evidence sufficient to establish that defendant violated the law (1) to prevent a significant evil, (2) with no adequate alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief in the necessity, (5) with such belief being objectively reasonable, and (6) under circumstances in which he did not substantially contribute to the emergency. [Citations.]” (*People v. Pepper* (1996) 41 Cal.App.4th 1029, 1035.)

The only evidence suggesting necessity was appellant’s testimony that his sudden braking, which he claimed to have done in order to turn onto a dirt road, was necessary to prevent the significant evil of being shot by the motorcyclists. Such testimony describes self-defense, upon which the trial court amply instructed the jury.⁶ Further, appellant did not testify that after turning his truck, he chased the motorcycles in order to prevent a greater harm. On the contrary, he denied chasing the motorcycles, claiming that the motorcycles continued to chase him while he attempted to evade them. Moreover, appellant admitted to the deputies that he chased the motorcycles out of anger. Thus, there was evidence that

⁶ The court instructed: “The defendant is not guilty of the crimes alleged in counts 2 and 3, if he used force against the other person in lawful self-defense. The defendant acted in lawful self-defense if, one, the defendant reasonably believed that he was in imminent danger of suffering bodily injury or was in imminent danger of being touched unlawfully[;] two, the defendant reasonably believed that the immediate use of force was necessary to defend against that danger; and three, the defendant used no more force than was reasonably necessary to defend against that danger. Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed that this was imminent in relation to him. Defendant’s belief must have been reasonable and he must have acted because of that belief. . . .”

appellant assaulted the motorcyclists by chasing them in anger, and conversely, that he drove away from them in self-defense. No evidence suggested that he intentionally drove toward them in order to prevent a significant harm.

We conclude that substantial evidence did not support the defense of necessity, and further, that such a defense was not consistent with appellant's theory of the case. Thus, the trial court had no duty to instruct sua sponte regarding necessity. (See *People v. Breverman*, *supra*, 19 Cal.4th at p. 157.)

DISPOSITION

The judgment is affirmed. The clerk of the trial court is ordered to prepare and file an amended abstract of judgment reflecting that appellant was sentenced under Penal Code section 667, subdivision (a). The clerk shall forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.